OFFICE OF THE STATE PUBLIC DEFENDER
STATE OF MONTANA

Brian Schweitzer
Governor

Chief Public Defender
Randi Hood

MONTANA PUBLIC DEFENDER COMMISSION BRIEFING
APRIL 18, 2008 MEETING
LEGISLATIVE ISSUES

Law and Justice Interim Committee

- **Meeting dates: April 10 and 11, June 26 and 27, August 1 and September ?**
- **Possible mental health legislation**
- **Possible juvenile detention legislation**
- **Any legislation that we want them to carry? Need by June 26 and no later than August 1**
- **Recording of calls in jails issue?**
- **Public defender fee assessments?**

Legislative Finance Committee

- **Meeting dates: June 5 and 6, October 9 and 10, and November 18**
- **Performance reports due in June and update on any fiscal issues**
- **They have asked all agencies – are you expecting a supplemental for FY 2008?**
- **They are not yet questioning FY 2009**

61st Legislative Session begins January 5, 2009

- **Governor's Budget due to legislature in November 2008**
- **Our budget due to OBPP in May 2008 and finalized in September 2008**

Legislative Committee of the Commission

- **Review Draft Letter**
- **Schedule Meeting**

Guidance for Members Appointed to Boards and Commissions within the Executive Branch of Montana State Government

Each legislative session, board and commission members raise questions about the roles they may play, either as members of boards and commissions or as private citizens, in impacting legislative policy and specific legislation that is germane to the legitimate purposes of each board or commission.

The following guidance is being provided to help streamline communication, coordinate legislative issues, and assist executive branch state board and commission members about legislative advocacy. The guidance applies to members of boards and commissions under the supervision of the Governor. It does not apply to advisory councils, which typically are established solely for the purpose of providing advice to the executive branch agency to which they are attached and not for the purpose of legislative advocacy.

The Governor is the Chief Executive Officer of the executive branch of state government and is charged with formulating and administering the policies of the branch, including budget policies and priorities. The Governor's responsibility extends to positions taken by executive branch agencies before the legislature. Like departments, boards and commissions are agencies of the executive branch.

Coordination of legislation within the executive branch is important not only to guarantee consistency of policy within the executive branch, but to help prevent conflict in the laws and keep board and commission members informed of the Governor's policy, budget, and legislative goals. One way coordination works is to have all agencies, including boards, commissions, departments, and their units seek pre-approval before taking positions on legislation.

Generally, boards or commissions become involved in supporting agency bills brought on their program's behalf to correct program defects, fix statutory problems or ambiguities, resolve conflicts in the laws they administer, or generally make consensual improvements to services. Less frequently, boards or commissions become involved in bills brought by others of a more substantive or controversial nature. Less frequently, yet, a conflict may arise among executive branch agencies at a policy or priority level with regard to legislation involving programs within the executive branch of state government. On such occasions, the Governor is empowered to resolve the conflict and make a final decision.

Before a board or commission can take a position as an agency on a bill, it must provide proper public notice, allow opportunity for public participation, and take its position by passing a motion. *See generally*, Title 2, chapter 3, parts 1 and 2, MCA and § 2-15-124(8), MCA. Alternatively, a board or commission can vote to authorize positions "in concept," rather than positions on specific legislation, in

recognition of the need for flexibility during the rapid legislative process. Always, but particularly in these latter cases where board members adopt conceptual positions, if individual members testify, they should be sure they understand the board's position so that legislators and the public do not receive conflicting messages, and fellow board members are not caught by surprise.

Once the board or commission passes a motion, it should seek the Governor's approval. The board or commission is requested to proceed through the head of the agency to which the board is attached (usually a department director), who, if the Governor's position is not known, will convey the request to the Governor's Office. Typically, the board chair or staff for the board will make the request. The request through the agency head can be made very informally, e.g., through staff at a board meeting, a telephone call, or an e-mail. The request should explain why the legislation is important and how it impacts the board or commission program.

Once the position of the board or commission has been approved as consistent with the Governor's position, the board can decide which members, if any, should appear to testify on the legislation. Board members should give only testimony that is factual and technical and within the confines of what a majority of the board or commission members have approved. If testifying at the legislature in the performance of board duties, a member of a quasi-judicial board is entitled to compensation and reimbursement for travel expenses. § 2-15-124, MCA.

There may be times when you and your fellow board or commission members, or the Governor's Office, do not agree with a proposed position on legislation. In such instances, a board or commission member can appear on his or her own time to testify on his or her own behalf. When testify as a private citizen, the board member is not entitled to compensation or travel reimbursement from the state.

In all cases, when testifying, board members should expressly state whether they are appearing as private citizens or on behalf of the board or commission on which they serve.

Finally, please remember that the time spent in an activity such as testifying as a proponent or opponent must comply with Montana's lobbying laws and rules. *See,* the Commission on Political Practices website and Title 5, chapter 7, MCA.

The volunteer service given by each board and commission member is invaluable in making critical decisions on important issues effecting Montanans. Your hard work and dedication is essential and greatly appreciated.

HOUSE BILL NO. 172

INTRODUCED BY M. CAMPBELL

BY REQUEST OF THE PUBLIC DEFENDER COMMISSION

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A STATEMENT BY A PERSON DURING CUSTODIAL QUESTIONING IS PRESUMED TO BE INADMISSIBLE IN EVIDENCE UNLESS IT IS ELECTRONICALLY RECORDED; PROVIDING GROUNDS FOR REBUTTAL OF THE PRESUMPTION; AND REQUIRING PRESERVATION OF THE RECORDING."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Recording of custodial questioning -- admissibility.** (1) As used in this section, the following definitions apply:

(a) "Custodial questioning" means the questioning in this state by a state or local government law enforcement officer of a person who is in custody and is questioned concerning an act, occurrence, or failure to act that is or may be a criminal offense. Custodial questioning is questioning conducted in a law enforcement office or vehicle, courthouse, correctional facility, community correctional center, detention facility, health care facility, or any other place where adequate electronic recording equipment can be made readily available, whether or not the equipment is in fact available.

(b) "Electronic recording" means a complete and authentic recording created by motion picture, videotape, audiotape, or digital media.

(2) An oral, written, or sign language statement of a person made during custodial questioning is rebuttably presumed to be inadmissible in evidence in a criminal proceeding unless:

(a) the custodial questioning was electronically recorded in its entirety;

(b) at the start of the custodial questioning and electronic recording, the person was given the requisite Miranda warning and knowingly, intelligently, and voluntarily waived the rights referenced in the warning;

(c) the electronic recording equipment was capable of making an accurate recording, the equipment operator was competent, and the electronic recording has not been altered;

(d) each electronically recorded voice that is material to the custodial questioning is identified; and

(e) at least 20 days before the beginning of any trial or hearing in which it is contemplated that the

electronic recording will be introduced in evidence, the defense attorney, or the defendant if the defendant does not have a defense attorney, is provided with a true, complete, and accurate copy of the electronic recording.

(3) The presumption of inadmissibility of the statement may be overcome by clear and convincing evidence that the statement was voluntary and reliable and that the law enforcement officer or officers conducting the custodial questioning had good cause for not electronically recording the custodial questioning. Good cause includes but is not limited to:

(a) custodial questioning conducted in a place where electronic recording equipment could not be made readily available;

(b) refusal of the person questioned to have the custodial questioning electronically recorded, and the refusal itself was electronically recorded; or

(c) equipment failure that resulted in the inability to electronically record the custodial questioning in its entirety.

(4) The electronic recording must be preserved until:

(a) the statute of limitations has run out for any offense for which the person might be charged;

(b) for any offense for which the person could be and was charged, the person was found not guilty; or

(c) for any offense for which the person could be and was charged, the person was convicted and all time for appeal, postconviction relief, and habeas corpus relief has passed and the conviction has become final.

(5) This section does not apply to a statement made in a judicial hearing or trial or before a grand jury or spontaneously made during or after the commission of an offense and not made in response to custodial questioning.

NEW SECTION. **Section 2. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 46, chapter 16, part 2, and the provisions of Title 46 apply to [section 1].

- END -